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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY SCOTT PRESSLEY,

Defendant and Appellant.

D054563

(Super. Ct. No. SCD211884)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed.

A jury convicted Gregory Scott Pressley of one count of corporal injury to his spouse, Jocelyn L., in violation of Penal Code¹ section 273.5, subdivision (a) (hereafter referred to as section 273.5(a)). The jury also found true the allegation that during his commission of that offense, Pressley personally inflicted great bodily injury upon

¹ All further statutory references are to the Penal Code.

Jocelyn, who was not an accomplice to the offense, within the meaning of section 12022.7, subdivision (e). At the sentencing hearing, the court granted Pressley three years of formal probation.

Pressley appeals, contending (1) the evidence is insufficient to support his conviction of corporal injury to a spouse because the evidence, viewed in the light most favorable to the judgment, does not show that Jocelyn's injuries resulted from direct physical contact by Pressley; (2) the court committed *Doyle*² error by allowing the prosecutor to cross-examine him on his post-arrest silence, as well as by permitting the prosecutor to comment on this matter during closing argument; and (3) the court violated his constitutional rights by refusing to state at the end of the People's case-in-chief whether it would instruct the jury on self-defense, thereby forcing Pressley to testify. We affirm the judgment.

FACTUAL BACKGROUND

A. *The People's Case*

In October 2007³ Pressley and Jocelyn were husband and wife. Two prior physical incidents between the couple, one in April and one in July, resulted in Jocelyn applying in late July for a temporary restraining order against Pressley. A couple of days later, Jocelyn had the order lifted because she and Pressley were going to "work things out."

² *Doyle v. Ohio* (1976) 426 U.S. 610, 611, 619 (*Doyle*), discussed, *post*.

³ All further dates are to calendar year 2007.

In the early morning hours of October 27, Jamela Williams awoke to the sound of shouting from an apartment behind hers. She heard loud voices of a man and a woman who were arguing. Then she heard glass break and a scream. Williams called the police. Williams saw Jocelyn leaving her apartment and heard her screaming that she was hurt and bleeding. Jocelyn, who was hysterical, said "he pushed me," and she needed help. A few minutes later, Pressley came out of the apartment. Williams, who had called 911, told Pressley he needed to leave, and he left. Williams saw blood on Jocelyn as Jocelyn sat on the ground. She stayed with Jocelyn until the police arrived. Williams heard Jocelyn indicate to the police officers that she and Pressley had been arguing. She had just come back from going out, Pressley may have been drinking and he was upset with her. When she fell, she hit the bed and rolled, and her leg ended up going through the window.

City of San Diego Police Officer Nicolas Gonzales testified he responded to a domestic violence call and arrived at the scene, a military housing complex, where he contacted Jocelyn, who was sitting on the ground in the parking lot with another female. Jocelyn had a deep laceration on the front of her left leg. He also saw blood on Jocelyn's right leg. Jocelyn, who was upset and crying, identified Pressley, who was not present, as the person who hurt her. Officer Gonzales entered the apartment and observed that the bedroom window was broken. The paramedics arrived and transported Jocelyn to the hospital.

Officer Gonzales spoke to Jocelyn at the hospital. Jocelyn told him that she and Pressley started to argue in the bedroom after they returned home from a nightclub. She

said she wanted to stop arguing and leave, so she grabbed the keys to their car. Pressley then grabbed the keys out of her hand and grabbed her by the shoulders and threw her across the bed. Jocelyn's legs flew up off the bed and hit the window. Jocelyn also told Officer Gonzales that Pressley did this in "one motion," and she crawled out of the bedroom as Pressley yelled at her. Jocelyn testified that although she was hysterical and intoxicated, she tried to be truthful when she spoke to the police.

In early November, Detective Desiree Spurlock, who worked in the Domestic Violence Unit of the San Diego Police Department, contacted Jocelyn to confirm the accuracy of her statements to Officer Gonzales. After Detective Spurlock read Jocelyn's statements to her, Jocelyn made no corrections or changes to the statement. She agreed her statement to Officer Gonzales was correct and provided some additional information.

At trial, which took place about a year later in November 2008, Jocelyn testified on direct examination that she was not sure whether she told Detective Spurlock that her initial statement to Officer Gonzales was accurate, but she could have told the detective that her statement was accurate.

Jocelyn then changed her account about the details of what happened. She stated that she could not find her car keys after she and Pressley returned home from a nightclub, and she assumed Pressley had them. She was angry with him because he had been dancing with other females at the club, and she asked Pressley for the car keys because she wanted to leave. Pressley told her he did not have the keys and then went into the bedroom and sat on the bed. Believing that Pressley had the keys, she got on the bed, kneeling behind him, and tried to reach into his pockets to find them. She then put

her right arm around Pressley's neck, trying to choke him, so he would give her the keys. Jocelyn also testified that when Pressley stood up, she stood up with him. Pressley pushed her away and she fell back onto the bed, and the next thing she knew her leg went out the window. She stated that when she fell back on the bed, she "kind of like bounced off the bed and bounced up and they went through the window." The window broke and some glass fell on her, cutting her left shin. That cut required 13 stitches.

Jocelyn testified she looked at Pressley and screamed at him to get away from her. She tried calling 911, but when nobody answered, she went outside. One of her neighbors called the police. She also stated that when the police and emergency medical personnel arrived, she was taken to Balboa Hospital in an ambulance, but she did not recall telling the paramedics that Pressley assaulted her and pushed her over a bed. She acknowledged that she told the doctors and nurses at the hospital that Pressley threw her down on the bed, and she went through a window on the other side of the bed. She testified, however, that that is not what happened and that she was intoxicated, hysterical and upset when she spoke to the doctors and nurses. Jocelyn could not recall telling any of the police officers, paramedics, doctors, nurses, or anyone she spoke to after the incident that she had put her arm around Pressley's neck during the incident. She also did not recall telling anyone that she had tried to reach into Pressley's pocket to try to find her keys.

Detective Spurlock testified that Jocelyn did not tell her that she put her arm around Pressley's neck or choked him during the incident. She also testified that Jocelyn

never said that she was on her knees on the bed trying to get the keys from Pressley's pocket before she was thrown.

Officer Gonzales stated he did not recall Jocelyn telling him that she put her arm around Pressley's neck, and she did not tell him that she tried to choke Pressley or that Pressley flipped her over to get her off of him.

B. The Defense Case

Pressley testified. He stated that he understood he did not have to testify, and he was choosing to testify.

Pressley stated that on October 26 he went to a nightclub with his friends, and met Jocelyn and her friends there. When he left the club, Jocelyn was still there. When he returned home, Jocelyn was in the living room, and then she went into the bedroom. Pressley went into the bedroom to watch television, sat down on the bed, and tried to talk to Jocelyn, who was also sitting on the bed. Jocelyn, who was sitting behind Pressley, was intoxicated and angry with him because he had danced with other women at the club. Jocelyn asked him for her keys, but he did not have them.

Pressley stated that when he told Jocelyn he did not have the keys, she got on her knees, came up behind him, and put her right arm around his neck. After about 10 seconds, Jocelyn squeezed "real hard." She told him to give her the keys, and she tried to reach into his pocket. Pressley first testified that it felt "uncomfortable" when Jocelyn had her arm around his neck, then he stated Jocelyn was hurting him. He testified that she was choking him, and he "had to do something, self-defense." He got up and threw his arm and shoulder back, trying to get her off of him, and she "fell back" on the bed,

and her leg went through the window. Jocelyn told him to leave, and he left the apartment a couple of minutes later.

Pressley denied that he hit, slapped, or punched Jocelyn that day. He stated he never picked her up by her shoulders and threw her out the window. He denied that he tried to push her into the window. He also denied that he tried to intentionally hurt Jocelyn.

DISCUSSION

I. *SUFFICIENCY OF THE EVIDENCE*

Pressley first contends the evidence is insufficient to support his conviction of corporal injury to a spouse (§ 273.5(a)) because the evidence, viewed in the light most favorable to the judgment, does not show that Jocelyn's injuries resulted from direct physical contact by Pressley. We conclude substantial evidence supports his conviction.

A. *Standard of Review*

When assessing a challenge to the sufficiency of the evidence, we must view the evidence most favorably to the prosecution and determine whether any rational trier of fact could have found the elements proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

B. *Analysis*

Section 273.5(a) provides: "Any person who *willfully inflicts* upon . . . his . . . spouse . . . corporal injury resulting in a traumatic condition, is guilty of a felony" (Italics added.) Section 273.5(a) "criminalizes the willful infliction of corporal injury resulting in a traumatic condition upon a cohabitant." (*People v. Jackson* (2000) 77 Cal.App.4th 574, 575 (*Jackson*).)

Pressley relies on *Jackson, supra*, 77 Cal.App.4th 574 for the proposition that a violation of section 273.5(a) "requires proof the victim's injuries resulted from direct physical contact by the defendant." Based on this interpretation of both *Jackson* and section 273.5(a), he contends the evidence, viewed in the light most favorable to the judgment of conviction, does not show that Jocelyn's leg injury resulted from direct physical contact by him or that he shoved her through the window, and thus the evidence is insufficient to show he violated section 273.5(a). He claims his conviction under section 273.5(a) must be reversed because the evidence only shows that he gripped Jocelyn by the shoulders and threw her on the bed that was next to the window. She bounced on the bed, her foot broke the window, and the broken glass cut her leg. He thus suggests that Jocelyn, not he, was responsible for what happened after he threw her on the bed.

Pressley misconstrues both *Jackson* and section 273.5(a). In *Jackson*, the defendant pushed his girlfriend against a car parked on the street. (*Jackson, supra*, 77 Cal.App.4th at p. 576.) In an attempt to get away from the defendant, the victim turned around, tripped over the curb of the sidewalk and fell to the ground, suffering abrasions

to her left thigh and calf. (*Ibid.*) On appeal, the defendant claimed the evidence was not sufficient to prove he violated section 273.5 because the victim's injuries resulted from her own movements. (*Ibid.*) After examining the language and legislative history of section 273.5, the Court of Appeal held that "the section is not violated unless the corporal injury *results from a direct application of force on the victim by the defendant.*" (*Jackson, supra*, at pp. 577-578, 580, italics added.) Applying this interpretation of the statute to the undisputed facts of that case, the *Jackson* court concluded that the evidence was insufficient to prove the defendant "inflicted" corporal injury on his girlfriend within the meaning of section 273.5. (*Jackson, supra*, at p. 580.) Significantly, however, the *Jackson* court explained that "[i]f the victim fell *as a direct result of the blows inflicted by [the defendant]*, we would conclude [he] inflicted the corporal injury she suffered in the fall." (*Ibid.*, italics added.)

Pressley mistakenly asserts that the instant case is factually indistinguishable from *Jackson*. In *Jackson*, as already noted, the victim was injured not when the defendant pushed her against the car, but when the victim, in her attempt to get away from him, turned away and tripped over the curb. Her acts of turning away and tripping over the curb resulted in her falling to the ground and suffering physical injuries. (See *Jackson, supra*, 77 Cal.App.4th at p. 576.)

Here, the evidence, when viewed in a light most favorable to the judgment of conviction, is sufficient to prove to any reasonable trier of fact beyond a reasonable doubt that Jocelyn's injury resulted from Pressley's "direct application of force" on her (*Jackson, supra*, at p. 580) and thus that he willfully inflicted corporal injury resulting in

a traumatic condition within the meaning of section 273.5(a). Specifically, the evidence shows that when Pressley grabbed Jocelyn by the shoulders and threw her across the bed, her legs flew up when she bounced off the bed, and her foot went through the window, breaking the glass, which lacerated her leg. The evidence shows that Jocelyn told Officer Gonzales that Pressley did this in "one motion."

Pressley maintains there is "no relevant distinction" between "[Jocelyn's] leg either rolling or bouncing on the bed" and the *Jackson* victim's "turn[ing] or roll[ing] off the car" or between Jocelyn's foot hitting the window and the *Jackson* victim's foot hitting the curb. Pressley misconstrues the facts in *Jackson*, and based on this misconception suggests that Jocelyn's foot hitting the window was the result of a volitional act by Jocelyn, rather than the result of Pressley's direct application of force on her. Nothing in *Jackson* suggests, as Pressley does here, that the victim in that case "rolled off the car" after the defendant pushed her against it. Rather, the uncontradicted evidence showed the victim had been attempting to get away from the defendant immediately before he pushed her against the car and, after he pushed her against it, she tripped over the curb when she turned around in her continuing attempt to get away from him. Here, in contrast, there is no evidence from which a rational trier of fact could reasonably infer that Jocelyn's bouncing off the bed after Pressley threw her on it, and the concomitant flying up of her legs, was in some manner volitional on her part.

We thus reject Pressley's claim that the evidence is insufficient to prove that Jocelyn's leg injury was the result of his direct application of force on her, and thus insufficient to prove he willfully inflicted upon Jocelyn a corporal injury resulting in a

traumatic condition. We conclude that Pressley's conviction under section 273.5(a) is supported by substantial evidence.

II. *DOYLE ERROR CLAIM*

Pressley next contends the court committed *Doyle* error by allowing the prosecutor to cross-examine him about his post-arrest silence, and by permitting the prosecutor to comment on this matter during closing argument. We reject this contention.

A. *Background*

On cross-examination, after Pressley gave on direct examination his account of the incident in which he stated that Jocelyn was choking him and he had acted in self-defense, the prosecutor asked him, "Besides Friday of last week and Tuesday, have you ever told anyone else of this account of what occurred?" Defense counsel objected on unspecified grounds, and the court sustained the objection.

The prosecutor then asked Pressley, "Well, did you ever tell anyone else besides your attorneys what happened?" Defense counsel told the court, "Still objecting, Your Honor." The court then granted defense counsel's request for a sidebar conference, which was not reported.

Back on the record, the court permitted the prosecutor to ask Pressley, "Have you ever told anyone else, with the exception of your attorneys, of the account that you gave this jury on Friday?" Pressley replied, "No."

During his closing argument, after telling the jurors it was up to them to judge Pressley's credibility, the prosecutor stated, "One of the things amongst many he told you was he's never mentioned this account to anyone else until he told you on Friday."

B. Applicable Legal Principles

"To protect the Fifth Amendment privilege against self-incrimination, a person undergoing a custodial interrogation must first be advised of his right to remain silent, to the presence of counsel, and to appointed counsel, if indigent." (*People v. Stitely* (2005) 35 Cal.4th 514, 535, citing *Miranda v. Arizona* (1966) 384 U.S. 436, 444, 467-473, 478-479.)

It is settled law that when a defendant presents an exculpatory version of the events for the first time at trial, it is fundamentally unfair and a denial of federal due process for the prosecution to impeach a defendant's testimony at trial by using the defendant's post-arrest silence following advisement under *Miranda*, *supra*, 384 U.S. 436, of his or her right to remain silent. (*Doyle*, *supra*, 426 U.S. at pp. 611, 619; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.) In *Doyle*, the defendants were charged with the sale of marijuana. Following their arrest, they exercised their right to remain silent after they were given *Miranda* warnings. (*Doyle*, *supra*, 426 U.S. at pp. 611-612.) At their respective trials, the defendants testified that they only tried to purchase the marijuana, and the seller had "framed" them. (*Id.* at pp. 612-613.) On cross-examination, the prosecutors asked the defendants why they had not told the frame-up story to the police officer who arrested them and gave them the *Miranda* warnings. (*Doyle* at p. 613.) The United States Supreme Court held in *Doyle* that the use for impeachment purposes of the defendants' silence at the time of arrest, after they received *Miranda* warnings, violated the due process clause of the Fourteenth Amendment to the federal Constitution. (*Doyle* at p. 619.) Noting that silence in the wake of *Miranda*

warnings may be nothing more than the arrestee's exercise of the *Miranda* rights, the *Doyle* court reasoned that "while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings." (*Doyle* at p. 618.)

Although it is an established principle of constitutional law that once an accused has been admonished pursuant to *Miranda*, his or her silence may not be used to impeach an explanation subsequently offered at trial, this *Doyle* rule of exclusion does not apply if the *Miranda* admonishment has not been given. (*Fletcher v. Weir* (1982) 455 U.S. 603, 605-607; see also *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842 (*Delgado*) ["It is thus clear that where *Miranda* warnings have not been given, the federal rule, as announced in *Fletcher v. Weir*, governs, and *Doyle* error is not committed by questions or commentary concerning a defendant's post-arrest silence."].)

Also, because *Miranda* warnings must be given only to defendants who undergo a custodial interrogation, a reviewing court need not assume the defendant was Mirandized where no evidence was adduced at trial showing the defendant was ever questioned by the police. (*Delgado, supra*, 10 Cal.App.4th at pp. 1842-1843.)

C. Analysis

Here, the record does not show that Pressley was given his *Miranda* rights. Pressley notes that there is no record of an officer receiving a statement from him, and no officer testified to having received such a statement. He asserts, however, that "it would be proper to assume [he] was made aware of these rights" because "it is clear that [he]

was arrested," and "officers are required to read a suspect his *Miranda* rights upon arrest."

There is nothing in the record to indicate that Pressley was ever subjected to custodial interrogation in this matter or that he was given his *Miranda* rights upon arrest or at any other time. Accordingly, we reject Pressley's contention that the court committed *Doyle* error. (See *Delgado, supra*, 10 Cal.App.4th at pp. 1842-1843.)

III. SELF-DEFENSE INSTRUCTIONS

Last, Pressley contends the court violated his constitutional rights by refusing to state at the end of the People's case-in-chief whether it would instruct the jury on self-defense, thereby forcing Pressley to testify. We reject this contention.

A. Background

After the People rested, the court granted defense counsel's request for a chambers conference. Defense counsel informed the court she was going to request a self-defense instruction based on Jocelyn's testimony that she had put her arm around Pressley's neck and reached into his pocket and that Pressley then got up and pushed her. Defense counsel stated she "wanted to discuss whether . . . the court was going to give the self-defense instruction." She added, "I think that would then determine my next step."

The court replied that it did not "usually rule on that until the evidence is in, so I'm not sure I can give you a ruling on it. It's a Catch-22 for you."

Defense counsel stated she did not "want to take the chance of not getting an instruction in" and noted that "the issue is substantial evidence, and I think that based on what [Jocelyn] testified to that that should be enough to get self-defense in on this case."

The court said, "You take the chance," and "I think at this point you need to put on whatever evidence you think is appropriate in order to raise whatever defenses you think are appropriate." Defense counsel reiterated she wanted "clarity on the issue of self-defense, then I can determine what other evidence I think is appropriate."

The prosecutor noted that it was "highly unusual" for the defense to ask the court for a ruling on a defense prior to the case being presented. The court replied that because "jury instructions are based on all evidence from all sides during the case in chief from the prosecution, the defense[,] rebuttal [and] surrebuttal," it "[did not] know that [it could] give [her] a" Defense counsel interjected that she did not know whether there was a rule saying the court could not rule on the issue before the defense presented any evidence. The court recognized that defense counsel was asking for a ruling on whether a self-defense instruction was warranted based upon the People's evidence and stated "tentatively" that there was "a viable argument for a self-defense instruction," but concluded that it would be "irresponsible" to rule on the issue when it did not have all the evidence.

After a brief recess, Pressley testified. As already noted, he stated that he understood he did not have to testify, and he was choosing to testify.

Later, before the prosecutor concluded his cross-examination of Pressley, the court and counsel discussed jury instructions outside the presence of the jury. The court later instructed the jury with CALCRIM Nos. 3404 ("Accident") and 3470 ("Right to Self-Defense or Defense of Another").

B. *Analysis*

Pressley has cited no authority, and we are aware of none, that requires a trial court to decide which instructions will be given to the jury before all the evidence has been presented.

Pressley's reliance on *People v. Cuccia* (2002) 97 Cal.App.4th 785, is misplaced. In *Cuccia*, as Pressley acknowledges, the Court of Appeal held the trial court violated the defendant's constitutional rights by requiring him to testify out of order or rest his case when a scheduled defense witness could not be located. (*Id.* at p. 790.) Pressley also acknowledges that "*Cuccia* is clearly not identical to the case at bar." We agree and conclude that *Cuccia* does not compel a determination that the court violated Pressley's constitutional rights by refusing to state at the end of the People's case-in-chief whether it would instruct the jury on self-defense. In any event, the record shows that Pressley voluntarily chose to testify at trial.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.